(6)

No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

CURTIS B. CAMPBELL and INEZ PREECE CAMPBELL,
Respondents.

On Writ of Certiorari
to the Utah Supreme Court

BRIEF OF *AMICUS CURIAE* THE BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Business Roundtable is an association of chief executive officers of major corporations with many millions of shareholders and a combined workforce of more than 10 million employees in the United States. For thirty years it has been devoted to examining policy issues affecting the U.S. economy and developing positions that reflect sound economic and social principles. The Business Roundtable has an interest in ensuring that the Court is fully informed about the manner in which current punitive damages procedures in Utah and many other States fundamentally differ from punitive damages proceedings at common law in a manner that results in arbitrary, discriminatory, and excessive punitive damages awards.[2]

SUMMARY OF ARGUMENT

This Court has long emphasized that due process analysis begins by asking whether the procedure in question comports with traditional practice at common law. Traditional practice at common law did not permit juries to increase punitive damages based on a defendant's financial status. To the contrary, the fundamental requirement at common law was that punishments be proportioned to the wrongs for which they were imposed. A defendant's financial status was considered

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[1] Consent letters have been filed with the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, Margaret Cronin Fisk, *A Typical Verdict Last Year Was Way up, but Nothing like This One*, 22 Nat'l L.J. No. 27, p. A1 (Feb. 28, 2000) (reporting verdict of $107.6 million compensatory damages and $4.9 billion punitive damages in tort action against General Motors by five plaintiffs injured in a 14-year-old Chevrolet Malibu); *Alabama v. Exxon Corp.*, No. CV 99-2368, 2001 WL 1116835 (Ala. Cir. Ct. May 3, 2002) (verdict of $87.7 million in compensatory damages and $3.42 billion in punitive damages in fraud action by State of Alabama).

only to ensure that a punishment so proportioned would not deprive the defendant of his livelihood.

The common-law requirement of proportionality between punishments and wrongs reflects the two theories of punishment that prevailed at common law and that still prevail today: retribution and deterrence. Proportionality is the fundamental precept of retributivist theory dating back at least to Leviticus, and it is a basic principle of deterrence theory dating back to the seminal formulation of a utilitarian theory of punishment by Jeremy Bentham.

In its most recent decisions examining due process safeguards against excessive punitive damages, this Court has established three guideposts for determining whether a punitive damages award is unconstitutionally excessive, all of which aim to ensure proportionality between punishments and the wrongs for which they are inflicted. In those same decisions the Court has given no indication that the proportionality requirement can be disregarded simply because a corporate defendant happens to have a substantial net worth.

The modern practice of allowing juries to impose increased punishment based on a corporate defendant's wealth engenders complete disregard of the proportionality requirement. It thereby strips away the fundamental common-law protection against arbitrary, discriminatory, and excessive punishment. In addition, in tort actions against corporations arising in a commercial context such as insurance coverage disputes, there is no rational basis for allowing juries to impose greater punishment on corporate defendants with greater net worth or assets than on defendants with lesser net worth or assets. Accordingly, the Due Process Clause prohibits the use of evidence of a corporate defendant's wealth for that purpose.

ARGUMENT

As in many cases with multi-million dollar punitive awards, the wealth of the business-entity defendant in this

case played a central role in the proceedings that led the jury to award massive punitive damages and the state supreme court to uphold that punishment. Respondent's counsel dwelled on the defendant's wealth both in examing witnesses and in closing argument. *See, e.g*; Tr. 108-110 (July 31, 1996) (discussing income and assets in dollars and percentages). The Utah Supreme Court likewise emphasized the company's wealth. *See* Pet. App. 15a, 17a, 30a, 32a.

This practice of allowing punitive damages to be increased based on a company's financial status departs from historical practice, conflicts with this Court's guideposts for setting and evaluating punishments and with deterrent and retributive principles, and maximizes the risk of arbitrary and discriminatory punishment. Accordingly, it violates due process.

I. ALLOWING JURIES TO INCREASE PUNITIVE DAMAGES BASED ON DEFENDANTS' WEALTH VIOLATES THE DUE PROCESS PROPORTIONALITY REQUIREMENT

This Court "has recognized that the requirement of proportionality [between punishments and the wrongs for which they are imposed] is implicit in the notion of due process." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 478-79 (1993) (O'Connor, J., dissenting); *see BMW of N. Am. v. Gore*, 517 U.S. 559, 576 (1996) ("[T]his Court [has] placed special emphasis on the principle that punitive damages may not be grossly out of proportion to the severity of the offense." (quotation marks omitted)); *see Weems v. United States*, 217 U.S. 349, 366-67 (1910) (stating as "a precept of the fundamental law" and "a precept of justice" that "punishment for crime should be graduated and proportioned to offense"). When juries are permitted to disregard this requirement and use evidence of corporate defendants' wealth to increase punitive damages, due process is denied.

A. Proportionality Was a Fundamental Protection Provided at Common Law Against Arbitrary and Excessive Punishment, and Punishments Scaled to Defendants' Wealth Undermine That Protection

"As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The relevant touchstone here is reflected in the Court's observation that the principle that punishments should be proportioned to the wrongs for which they are inflicted "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983); *accord Gore*, 517 U.S. at 575 ("As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852); *TXO*, 509 U.S. at 478-79 (O'Connor, J., dissenting) ("[C]ourts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed."); *see Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability."); *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (considering whether award of civil penalty to plaintiffs who had a paid a 66-cent overcharge for train tickets was "wholly disproportioned to the offense or obviously unreasonable" and therefore violated due process). Often the requirement has been framed as one mandating proportionality between punitive damages and compensatory damages, undoubtedly because the nature and scope of harm caused by wrongful conduct often provides some indication of the conduct's reprehensibility and the amount of deterrence needed. *See Gore*, 517 U.S. at 580 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."); *TXO*, 509 U.S.

at 459 (plurality opinion) ("[S]tate courts have long held that exemplary damages allowed should bear some proportion to the real damage sustained." (quotation marks omitted)).

This requirement's common-law roots extend back to at least 1215. Magna Carta limited the imposition of amercements, the progenitor of punitive damages, by stating:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. . . . Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. No man of the Church shall be amerced . . . but . . . after the quantity of his offence.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposals, Inc., 492 U.S. 257, 288-89 (1989) (O'Connor, J., dissenting) (quoting Magna Carta ch. 20 (1215)). Moreover, "[a]fter Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would *then* be ascertained to *reduce* the amercement in accordance with the party's ability to pay." *Id.* (emphasis added). Thus, liability was determined, a punishment proportioned to the wrongdoing was selected, and only then was the defendant's financial status considered, and only to ensure that the monetary punishment was within his means.

After Magna Carta, many statutes were enacted that provided for punitive damages limited to a multiple of compensatory damages. *See Gore*, 517 U.S. at 580-81 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quad-

ruple damages.") On the other hand, we have found no such body of statutes or common-law decisions that in the same period scaled punishments according to defendants' wealth.

Thus, Magna Carta and the statutory and decisional law that followed it required punitive damages to be proportioned to the "manner of the fault," not to the wealth of the defendant. Wealth was used only to *limit* any punitive damages imposed.

The Declaration of Right in 1689 reaffirmed the prohibition of penalties disproportionate to the wrongs for which they were imposed. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Cal. L. Rev. 839, 860 (1969). When this country was founded a century later, the Framers included in the Eighth Amendment a prohibition against cruel and unusual punishment, derived directly from that Declaration. *Browning-Ferris*, 492 U.S. at 266; *see generally* Granucci, 57 Cal. L. Rev. 839.

In addition, the constitutions of no fewer than eight States expressly require proportionality between crimes and punishments. *See* Ill. Const. art. II, § 11; Ind. Const. art. I, § 16; Me. Const. art. I, § 9; N.H. Const. pt. I, art. 18; Ore. Const. art. I, § 16; R.I. Const. art. I, § 8; Vt. Const. ch. II, § 31; W.Va. Const. art. 3, § 5. Although these provisions refer only to punishments for crimes, they confirm that at common law a primary protection against excessive punishment was the proportionality requirement.

The earliest reported American case we could find in which a court sanctioned the use of a defendant's wealth to increase punitive damages was in 1825.[3] *See Bennett v.*

[3] One earlier decision sanctioned such a use of the defendant's wealth, but it was reversed for unspecified reasons. *See Ogden v. Gibbons*, 5 N.J.L. 518, 539, *rev'd, Gibbons v. Ogden*, 5 N.J.L. 853 (1819).

Hyde, 6 Conn. 24 (1825). There, one individual sued another for slander, and the court stated the following rationale for allowing the jury to consider evidence of the defendant's wealth:

> Great wealth is generally attended with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and, as a consequence not uncommon, of small influence.

Id. at 27. Thus, the defendant's wealth was considered relevant not because of any notion that wealthy defendants generally are more deserving of punishment or will not be deterred without punishments exceeding those inflicted on less wealthy defendants, but because of a belief that defamatory statements were likely to cause more harm when made by wealthier defendants. As late as 1868 the Supreme Court of Iowa stated:

> [W]hile some of the cases have held, that the pecuniary condition of a defendant may be shown, when plaintiff is entitled to vindictive damages, or in case of malicious torts, yet it is believed that the weight of authority is the other way. . . . Aside from the exceptional cases of slander and breach of promise to marry, courts should hesitate long before receiving such evidence, or allowing the jury to take into consideration the defendant's pecuniary ability, even under circumstances of aggravation, insult or cruelty, or of vindictiveness and malice.

Hunt v. Chicago & N.W.R.R., 26 Iowa 363, 373-74 (1868). The court observed that if defendants' wealth were allowed into evidence, "damages will be recovered, not according to the extent of the injury sustained, but the means of defendant to pay. . . . Such cannot be the rule." *Id.* at 374.

In the first case in which this Court discussed the nature of punitive damages at common law, it did not mention the defendant's wealth as a factor to be considered, but instead stated the proportionality requirement that had prevailed for centuries:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, *having in view the enormity of his offence* . . . . [A]nd the damages assessed depend on the circumstances, *showing the degree of moral turpitude or atrocity of the defendant's conduct* . . . .

Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (emphasis added).

It was not until 1859 that a reported case in this country arguably sanctioned the use of a corporate defendant's wealth to increase punitive damages. *See New Orleans, Jackson & Great* N.R.R. *v. Hurst*, 36 Miss. 660, 666-67 (1859) ("The law has not intrusted the court with a discretion to estimate damages, but has devolved the power on a jury, . . . duly weighing all the circumstances of the case, and considering the state, degree, quality, grade, or profession, as well of the party injured, as of him who did the injury."). That practice remained so rare throughout the remainder of the century that it was not until 1899 that any case reached this Court in which evidence of a defendant's wealth had been allowed to increase a punitive damages award, and in that case the Court reversed on narrower grounds without considering whether the procedure was allowable. *See Wash. Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899).

In sum, the fundamental, centuries-long common-law rule, both in England and in this country, required that punitive damages be proportioned to the wrong committed, not to the defendant's wealth. Neither when this country was founded

nor when the Due Process Clause of the Fourteenth Amendment was added to the Constitution did the prevailing common-law rule permit juries to ignore that requirement and use a corporate defendant's wealth to increase punitive damages awards. When courts latterly began to allow evidence of corporate wealth to provide a basis for massive punitive damages awards, they tore punitive damages loose from their common-law mooring and deprived corporate defendants of a primary procedural safeguard against arbitrary, discriminatory, and excessive punitive damages.

B. Punishments Scaled to Defendants' Wealth Conflict with the Guideposts Established by This Court to Ensure Proportionality

The Court in *Gore* established three guideposts for deciding whether a punitive damages award is unconstitutionally excessive: (i) The degree of reprehensibility of the defendant's conduct; (ii) the ratio of punitive damages to the actual and potential harm to the plaintiff; and (iii) legislatively established civil or criminal penalties for comparable misconduct. 517 U.S. at 574-85. All three guideposts are means for ensuring reasonable proportionality between punishments and wrongs, and all three are undermined by the use of evidence of corporate wealth to increase punishments.

The first guidepost directly applies the common-law proportionality test by asking whether the punishment is proportional to the wrong for which it is inflicted. In applying that guidepost the Court discussed (i) whether the wrong involved or threatened violence or harm to the health or safety of others; (ii) whether the wrong was intentional, rather than negligent; (iii) the victim's vulnerability; and (iv) whether the wrongdoer was a recidivist. *See id.* at 575-80. As logic would dictate, the Court did not mention the defendant's wealth: After all, if a punishment providing the proper ratio

to the reprehensibility of the wrong were then increased simply because the defendant was wealthy, the ratio would no longer be proper.

The second guidepost provides a quantitative means to check the reasonableness of the ratio used in applying the first guidepost. This checking means is helpful because the first guidepost posits an incommensurable ratio: a quantitative numerator stated in dollars (the punitive damages award), and a qualitative denominator that cannot readily be measured in dollars (reprehensibility). The second guidepost provides both a quantitative numerator and a quantitative denominator, each stated in dollars. It is only a partial surrogate for the required proportionality between punishment and wrong because the denominator captures only harm, not the defendant's mental state when inflicting or threatening the harm. But because, with rare exceptions, punitive damages are not permitted unless the defendant's misconduct was either reckless or intentional, this guidepost is in most instances a good surrogate for the fundamental proportionality required at common law and by the first guidepost.

In applying the second guidepost, the Court again did not mention the defendant's wealth as a permissible consideration. Again, logic dictated that omission: If a punishment properly proportioned to compensatory damages were increased simply because of the defendant's financial status, the resulting ratio would by definition be improper.

The third guidepost provides another means to check the reasonableness of the ratio used in applying the first guidepost. By comparing the punitive damage award to legislatively established punishments for comparable misconduct, courts can see how elected representatives have answered the question of what punishment fits the wrong in issue. Because most statutory punishment schemes specify both the conduct and the state of mind required for a designated penalty, this guidepost, unlike the second guidepost, has the advantage of

examining the proportionality of a punitive damages award in a way that takes into account both the defendant's mental state and the actual and threatened harm.

The schema of statutorily fixed punishments or ranges of punishments for a wide variety of misconduct existing at any given time has the substantial additional benefit that it reflects, at least in theory, the body politic's collective view of the proper hierarchy of reprehensibility—*i.e.*, which acts committed with which mental states are deserving of greater punishments and which are deserving of lesser punishments. By consulting that schema in determining whether a punitive damages award is proportional to the wrong for which it is to be inflicted, and by then comparing the punitive damages award to punitive damages awards for other wrongs, a court can ascertain whether roughly the same hierarchy is reflected in punishments imposed in the form of punitive damages as is reflected in statutory punishments in the form of criminal or civil fines. Because of the incommensurable nature of the numerator and denominator of the fundamental proportionality required by the first guidepost, and because elected representatives may be thought to be in a better position than a single jury or court to sense the public's valuation of the reprehensibility of different states of mind and different types of threatened harm and non-monetary harm, it is appropriate that the Court has emphasized that "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (quotation marks omitted).

As with the first two guideposts, use of a corporate defendant's wealth to increase punishment would conflict with the third guidepost. If a punitive award comports with statutory punishments for comparable misconduct, any increase in that award based on the defendant's wealth would destroy the proportionality the body politic sought through

the statutory schema (absent a statute scaling the punishment to the defendant's wealth). Permitting juries to use defendants' wealth to hike punitive damages to many multiples of the maximum fines determined by legislatures to be appropriate sanctions for the conduct at issue not only fails to accord substantial deference to legislative judgments, but ignores legislative judgments altogether. Once again, therefore, logic dictated that the Court in *Gore* should not mention defendants' wealth, and it did not.

The Court's omission of any mention of BMW's wealth when applying any of the three guideposts is especially noteworthy because the respondent, Dr. Gore, specifically suggested that the Court should consider BMW's finances. *See* Resp. Br. 39, *BMW of N. Am., Inc. v. Gore*, No. 94-896 (U.S.). Since the compensatory damages were only $4,000, 517 U.S. at 565, the case provided a perfect opportunity for the Court to validate the theme so often played by plaintiffs in recent years—that it takes a very large punitive damages award to "get the attention" of the highest levels of management in a large corporation. Implicitly, the Court recognized that to endorse that argument would be to abandon all three guideposts in favor of a due process "test" providing no guidance at all and no limit other than each defendant's wealth.[4]

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court again applied the *Gore* guideposts while omitting any mention of the defendant's

[4] The Court in *Gore* further indicated that evidence of wealth cannot properly be considered when it described certain circumstances in which "low awards of compensatory damages may properly support a higher ratio than high compensatory awards." 517 U.S. at 582. The three sets of circumstances identified were where "a particularly egregious act has resulted in only a small amount of economic damages," "the injury is hard to detect," or "the monetary value of noneconomic harm might have been difficult to determine." *Id.* The Court did not suggest that a higher ratio could be defended on the ground that the defendant was wealthy.

wealth. 532 U.S. at 435, 441-43. That omission was perhaps even more significant in *Cooper* because both the court of appeals and the district court had cited the defendant's "size and assets" to support their conclusion that the jury's punitive award was not unconstitutionally excessive. *See Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 205 F.3d 1351, 1999 WL 1216844 (9th Cir. 1999) (unpublished opinion).

In sum, the proportionality requirement provided a bedrock protection against excessive and arbitrary punishment for centuries at common law, and a fundamental aspect of the procedures that ensured the required proportionality was that corporate defendants' wealth could not be used to increase punishments. Only modernly have courts destroyed that safeguard by admitting evidence of corporate defendants' wealth, encouraging juries to consider wealth in setting punishment, and then, on appeal, upholding massive punitive awards by contending that such sums are needed to "get the attention" of large corporations. That practice violates the principle that, "consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Twining v. New Jersey*, 211 U.S. 78, 101 (1908).

II. ALLOWING JURIES TO INCREASE PUNITIVE DAMAGES BASED ON CORPORATE DEFENDANTS' WEALTH VIOLATES DUE PROCESS BY PERMITTING PUNISHMENT ON AN AD HOC AND SUBJECTIVE BASIS

The Due Process Clause prohibits procedures that result in punishments determined "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104,

108-09 (1972). Affirmatively, due process requires that punitive damages verdicts be reached on the basis of "rational decisionmaking." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991). Accordingly, the Court's punitive damages decisions have "strongly emphasized the importance of the procedural component of the Due Process Clause" in order "to ensure that punitive damages are not imposed in an arbitrary manner." *Oberg*, 512 U.S. at 420.

To ensure that punitive damages are not imposed in an arbitrary manner, the procedures employed must "make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21; *see also id.* at 22 (summarizing the reason the punitive damages procedures in Alabama survived due process attack by stating: "The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter.").[5] That cannot be accomplished if evidence of a publicly held corporation's net worth, assets, or income can be the basis for increased punishment, because no rational connection between basing increased punishments on corporate wealth and any theory of retribution or deterrence has been articulated, and no guideline has been articulated to guard against the use of wealth evidence to impose arbitrary and excessive punishments.[6] Indeed, a procedure that allows juries to increase

[5] Deterrence and punishment, or retribution, are the only two justifications the Court has acknowledged as legitimate purposes of punitive damages. *See Cooper Indus.*, 523 U.S. at 432; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[6] Under other circumstances, the Court has recognized that the admission of certain types of evidence can violate due process. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) ("[T]he use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause . . . .").

punishments based on corporate wealth is worse than arbitrary; it is systematic discrimination based on financial status, without any rational connection to the legitimate purposes of retribution and deterrence.

A. Punitive Damages Increased Because of a Corporate Defendant's Wealth Violate Basic Retributive Principles

Retributivism rests on the principle that the punishment inflicted on a wrongdoer must be proportional to the moral gravity of the offense. *See* Immanuel Kant, *The Philosophy of Law* 194-98 (W. Hastie trans. 1887); Georg Hegel, *Philosophy of Right* 71 (1958); A. Ewing, *Morality of Punishment* 39-40 (1929); W.G. Maclagan, *Punishment and Retribution*, 14 Philosophy 290-92 (1939); J.D. Mabbot, *Punishment, in The Philosophy of Punishment* 39, 39-41 (H. Acton ed. 1969). Retributivists reject any instrumentalist concept of punishment. *See, e.g.*, Immanuel Kant, *Metaphysics of Ethics* 281-82 (1871) ("Humanity Is Itself a Dignity; for no man can be employed, neither by others nor by himself, as a mere instrument, but is always to be regarded as an end . . . ."). Because the basic retributive principle requires that punishment be proportioned to the moral gravity of the wrongdoing, any intentional increase of a punishment beyond the level necessary to achieve the required proportionality is, as to the retributive purpose, arbitrary, discriminatory, and not based on rational decisionmaking. Accordingly, if a particular punishment is determined to be properly proportioned to the moral gravity of a particular offense, this principle would be violated by inflicting more punishment simply because the defendant happens to be wealthy.

Moreover, this Court's reasoning in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), shows that retributive principles make it especially important to guard against that error when the defendant is a corporation, because only deterrence, not retribution, can justify *any*

punitive damages against a corporate defendant. Reversing an award of punitive damages against a city, the Court stated:

> *Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct.* If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. *A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself.*

City of Newport, 453 U.S. at 267 (emphasis added). The Court then stated: "Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages." *Id.* at 268.[7]

Each of those observations in *City of Newport* applies with equal force to publicly held corporations and, as in this case, mutual insurance companies. First, an award of punitive damages against these entities "'punishes' only the [shareholders], who took no part in the commission of the tort." *City of Newport*, 453 U.S. at 267. Second, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing

[7] Common-law courts recognized that "malice or revenge cannot be imputed" to corporations "because they are not the personal actors". *Thompson v. Morris Canal & Banking Co.*, 17 N.J. 480, 484 (1840).

[shareholders]."[8] *Id.* Third, a corporation "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id.* Furthermore, with large, publicly held corporations, by the time a case has been tried to verdict, punitive damages assessed, appeals decided, and a final judgment entered, the shareholders who suffer the resulting loss of market value or a reduced dividend may be substantially different, or even entirely different, from the shareholders who benefited from the wrongful conduct many years earlier.[9]

[8] Long ago, disallowing punitive damages against the owners of a privateer ship whose crew had illegally boarded and wreaked havoc on another ship, this Court stated:

> [I]f this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered, that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet they can scarcely ever be able to secure themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, . . . they are not bound to the extent of vindictive damages.

The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558-59 (1818).

[9] In *City of Newport* the Court observed: "It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." 453 U.S. at 267 n.29. Likewise, it is perhaps possible to imagine an extreme situation where the thousands of shareholders of a publicly held corporation are directly responsible for perpetrating an outrageous act that causes harm, but any such possibility is chimerical at best. Also, the larger a corporation, the more likely it is that high-level management had no knowledge of the misconduct, and the less reprehensible the corporation's conduct will be. Accordingly, it would run directly against the retributive

Thus, increasing punitive damages against corporate defendants based on corporate wealth violates the basic retributive requirement of proportionality between punishments and wrongs.[10] To the extent that retribution is one of the only two legitimate purposes of punitive damages, any punitive damages award based on that procedure is arbitrary, discriminatory, and not based on rational decisionmaking.

B. Punitive Damages Increased Because of a Corporate Defendant's Wealth Violate Basic Deterrence Principles

It is not irrational to allow juries to impose greater punishment on wealthier individuals than on poorer individuals who have committed torts that are not economically motivated, such as assault or defamation, to attain the degree of deterrence necessary to deter additional wrongful conduct. Because it is generally accepted that a dollar is less important—in economic terms, has less marginal utility—to persons of great wealth than to persons of modest means, greater punishment may be needed to deter a multimillionaire from, say, punching or making a defamatory statement about someone. *See Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (Easterbrook, J.); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 61 (1982).[11]

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grain to punish the large, publicly held corporation more than the small, closely held corporation whose management and implementing employees are one and the same; yet that is what punishment based on wealth would mandate.

[10] The notion of retribution applied to a mutual insurance company is even more untenable, because the owners are the policyholders. In this case, for example, Respondent is both the recipient of the punitive damages award and one of the persons indirectly punished by the award.

[11] Even as to individuals, however, Magna Carta, the Declaration of Rights, and early common-law cases insisted on proportionality between punishment and offense. *See* pp. 5-8, *supra*. As with wealthy corporations, the risk that a jury will punish wealthy individuals out of passion and prejudice, not to attain the proper degree of deterrence, is great. Given this conflict with the common-law limitations and retributive principles, and the considerable risk that evidence of wealth creates a likelihood of arbitrary and discriminatory punishment, it may be that such evidence should be disallowed in all cases.

In almost all claims against corporations, however, it is irrational to allow juries, in the name of deterrence, to impose greater punishments based on the corporate defendant's greater wealth. As Judge Easterbrook has explained:

> Corporations . . . are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. . . . Corporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?

Zazu Designs, 979 F.2d at 508. In short, because corporations are economic actors, not individuals acting to satisfy a range of human emotions, a punishment should deter a corporation if it removes the prospect of gain from wrongful behavior, regardless of the corporation's net worth, assets, or income.

Because corporations seek to maximize profits for their shareholders, the effect of liability on their behavior will be the same regardless of their size. Small and large corporations alike will compare the cost of avoiding wrongful conduct to the liability likely to result from engaging in the wrongful conduct. Regardless of the corporation's net worth, its profits will be enhanced if the cost of avoiding the wrongful conduct is less than the liability that would result from engaging in the wrongful conduct. Whatever level of liability will induce a small corporation with minimal net

worth to act appropriately will equally induce a large, wealthy corporation to do the same. *See* 2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury* 254-55 (1991); Kenneth S. Abraham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989); Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 Ala. L. Rev. 741, 824-26 (1989); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-52 (1989).

Likewise, linking punitive damages to a corporate defendant's wealth cannot be justified on deterrence grounds by the notion that liability has to be a "noticeable" fraction of the firm's income or assets to ensure that top management will "get the message" about a need to change the wrongful behavior of some lower-level employees. The chief executive of a $100 million corporation may not be as concerned as the chief executive of a $1 million corporation about whether to spend, say, $100,000 on workplace safety improvements to avoid predictable liability judgments of, say, $150,000. There will be someone in the larger firm, however, such as a middle- or lower-level manager, who is responsible for that decision and whose job, bonus, or promotion may be affected by a failure to make the economically rational decision. To see that this is plainly so, consider why under any theory it should make any difference if the $100 million dollar corporation has ten unincorporated divisions or, instead, has ten wholly-owned subsidiaries, each separately incorporated. The manager of each operational group will face the same economic decisions regardless of whether his title is chief executive officer of one of the subsidiaries or division manager of the same operational group organized as a division of a single large corporation.

Another reason why corporate defendants' wealth cannot rationally be the basis for increasing punitive damages to achieve proper deterrence is that doing so results in larger companies' paying a larger share of their net worth in punitive damages. If, for example, General Motors recklessly uses a defective design in a million cars and Subaru, one-tenth GM's size, makes 100,000 identically defective cars, if one of every 50,000 of these cars has an accident caused by the defect, and if each punitive award is set at one percent of the defendant's net worth as of a specific date, Subaru will lose two percent of its net worth, but GM will lose twenty percent of its net worth. Thus, increasing punitive damages to reflect a company's size leads to disproportionate deterrence. *See* 2 Am. L. Inst., *supra,* at 254-55 & n.40.

Furthermore, dating back to Jeremy Bentham's seminal articulation of utilitarian philosophy in 1789, proportionality between punishments and wrongs has been a core principle of deterrence theory, just as it has always been the fundamental principle of retributive theory. *See* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 177-94 (1789). Bentham recognized that we cannot deter all wrongful conduct, and he therefore concluded that punishments should be scaled to the harmfulness of different types of wrongful conduct to induce wrongdoers to commit less harmful wrongs, rather than more harmful wrongs:

> But if a man must needs commit an offense of some kind or other, the next object is to induce him to commit an offence less mischievous, rather than one more mischievous: in other words, to choose always the least mischievous, of two offences that will either of them suit his purpose. . . . When a man has resolved upon a particular offence, the next object is to dispose him to do no more mischief than is necessary to his purpose: in other words, to do as little mischief as is consistent with the benefit he has in view.

Id. at 178. Allowing juries to base greater punishments on corporate defendants' wealth defeats this proportionality required by deterrent principles, just as it defeats the proportionality required by retributive principles. To the extent that deterrence is one of the only two legitimate purposes of punitive damages, any punitive damages award based on that procedure is arbitrary, discriminatory, and not based on rational decisionmaking.

A due process principle stated in *Gore* further undermines the propriety of using wealth as the basis to increase punitive damages awards against large corporations for deterrence purposes: "The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. When applied to corporations, the reasoning applied to municipalities in *City of Newport* shows that more effective deterrence can be achieved by punishing culpable corporate personnel, rather than corporations. *See* 453 U.S. at 269. It also shows that the monetary penalty will necessarily be far less drastic because the punitive damages awards against the individual personnel will be limited based on their "personal financial resources," *City of Newport*, 453 U.S. at 259, and because the penalty will be imposed directly on the one or few actual wrongdoers, rather than indirectly and massively on many thousands of innocent shareholders. As the Court stated in *Gore*: "In the absence of a history of noncompliance with known statutory requirements, *there is no basis* for assuming that a more modest sanction would not have been sufficient to motivate full compliance with [the defendant's legal obligations]." 517 U.S. at 584-85 (emphasis added). Because, under the reasoning in *City of Newport*, there is no basis for assuming that massive sanctions against corporate entities, rather than lesser sanctions against corporate personnel, are necessary, punishments based on such an

assumption are by definition arbitrary, discriminatory, and constitutionally impermissible.

C. This Court Has Never Held That Wealth-Based Punishment Comports with the Legitimate Purposes of Retribution and Deterrence

On occasion, opinions of various Members of the Court have suggested that increases in punishment based on corporate wealth may comport with retributive or deterrent principles. No majority opinion has done so, however, and no opinion has articulated, or cited support in retributive or deterrent literature for, a retributive or deterrent theory that would permit that practice.

In *Gore* three Justices observed that one factor the Alabama Supreme Court had held should be considered on appellate review of a punitive damages verdict was the defendant's "financial position." 517 U.S. at 591 (Breyer, J., concurring). They then stated: "Since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives)." *Id.* No citation to retributivist literature accompanied that view of retribution, however, and retributivist literature actually shows that wealth evidence is not only irrelevant, but anathema, to retributive principles. *See* pp. 15-19, *supra*.

In *TXO*, three Justices stated that "factors such as [evidence of the defendant's financial condition] are typically considered in assessing punitive damages. Indeed, the Alabama factors we approved in *Haslip* included [net worth]." *TXO*, 509 U.S. at 462 n.28 (Stevens, J.). The observation that net worth is "typically considered" is correct for recent years, but not, as we have shown, for early common law, especially in cases against corporate defendants. *See* pp. 6-9, *supra*. Moreover, this opinion did not explain how punitive damages

based on net worth could square with the requirement of proportionality between punishments and wrongs, with retributive principles, or, outside the context of wrongful acts committed by individual defendants for non-economic reasons, with deterrent principles.

In addition, the "financial position" factor considered under Alabama law and discussed by this Court in *Haslip* was considered in Alabama only on judicial review of jury verdicts for excessiveness, not as a factor on which the amount of punishment could be based in the first instance. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989). Under Alabama law, "in assessing punitive damages, the jury is not allowed to consider the financial position of the defendant," *id.*, and the Court in *Haslip* emphasized that fact in upholding the constitutionality of Alabama's punitive damages procedures, *see Haslip*, 499 U.S. at 19 ("Any evidence of Pacific Mutual's wealth was excluded from the trial in accordance with Alabama law."); *id.* at 22 ("[T]he fact-finder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.").

Still further, in *Green Oil*, the case cited in *Haslip*, the Alabama Supreme Court considered the defendant's *poor* financial position to affirm the trial court's *reduction* of the jury's punitive damages verdict. Thus, that case did not support the proposition that wealth could be used to justify an otherwise excessive punishment on appeal, and it certainly did not stand for the proposition that a jury could base a large punitive damages verdict on wealth in the first instance.

In *TXO*, three other Justices stated:

> This is not to say that consideration of a defendant's wealth is unconstitutional. To be sure, there are strong economic arguments that permitting juries to consider wealth is unwise if not irrational, especially where the defendant is a corporation. But [due process] does not require us to adopt the view of the Law and Economics school either. As a historical matter, the wealth of the perpetrator long has been thought relevant. Moreover, *Haslip* itself suggests that the defendant's wealth is a permissible consideration, although it does so only in the context of *appellate* review.

TXO, 509 U.S. at 491-92 (O'Connor, J., dissenting) (citation omitted) (emphasis in original). It is not just the view of the Law and Economics school, however, that makes wealth evidence irrational when the defendant is a corporation. No one has provided a rational explanation of why publicly held corporations, even if run by people entirely consumed by greed, completely unconcerned with the safety or welfare of human beings, would make decisions based on anything other than the likely effects on either short-term or long-run profits, or why wealthy corporations would be more likely than less wealthy corporations to try to maximize profits by engaging in harmful conduct. Nor has anyone explained why any rational corporation would be more likely to engage in wrongful conduct in a year when its net worth is very high than in a year when its net worth is very low, so that larger punitive damages awards are needed to deter wrongful conduct in the corporation's boom years than in its bust years.

D. The Use of Corporate Defendants' Wealth to Increase Punishment Violates the Due Process Requirements of Reasonable Constraints and Adequate Notice

Even if the use of corporate wealth as the basis to increase punishment is not so wholly unreasonable as to be per se unconstitutional, it spawns arbitrary and discriminatory punishment. The Court has acknowledged as much. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for example, the Court stated: "[I]n most jurisdictions . . . juries assess punitive damages in wholly unpredictable amounts bearing

no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views." 418 U.S. at 350; *accord Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) ("[P]unitive damages are frequently based upon the caprice and prejudice of jurors."). This description of what juries were doing was not limited by a qualifier such as that juries "may," "can," "sometimes," or "occasionally" assess punitive damages in wholly unpredictable amounts. Nor did this description say that juries remain "somewhat" free or "in some respects" free to punish expressions of unpopular views. Rightly, the description covered a systemic, constantly recurring phenomenon endemic in courts throughout the country. *See Oberg*, 512 U.S. at 432 ("Punitive damages pose an acute danger of arbitrary deprivation of property.").

Moreover, a majority of the Court has explicitly recognized that a primary cause of the problem is the admissibility of evidence of large institutional defendants' wealth. *City of Newport*, 453 U.S. at 270-71 ("Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is *likely* to be both unpredictable and, at times, substantial . . . ." (emphasis added));[12] *TXO*, 509 U.S. at 464 (Rehnquist, C.J., Blackmun, Stevens & Kennedy, JJ.) ("[T]he emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."); *id.* at 489 (White, O'Connor & Souter, JJ., dissenting) ("[I]ntroducing TXO's wealth into the calculus 'increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is,' as here, 'a nonresident.'"); *id.* at 490 (White, O'Connor & Souter, JJ., dissenting)("That a jury might have such inclinations [to redistribute wealth from large corporations] should come as no surprise. Courts long have recognized that jurors may view large corporations with great disfavor.").

[12] There is no reason to believe that evidence of the wealth of corporations like General Motors, Exxon, and General Electric, with incomes exceeding the national incomes of many countries, and with net worth exceeding the total net worth of all the citizens of most local communities in this country, would have a less prejudicial impact or be less likely to result in windfall recoveries that are "both unpredictable and, at times, substantial."

The admission of evidence of a corporate defendant's wealth not only invites punitive damages awards based on juries' inclination to redistribute wealth and discriminate against out-of-state corporations, but also leaves that inclination unchecked by any articulated principle, either at trial or on appeal. Due process requires procedures sufficient to ensure that juries will exercise their discretion in awarding punitive damages "within reasonable constraints." *Haslip*, 499 U.S. at 20; *accord Gore*, 517 U.S. at 587 (Breyer, J., concurring); *id.* at 43 (O'Connor, J., dissenting) ("Whether or not the jury instructions were so vague as to be unconstitutional, they plainly offered less guidance than is required under the due process test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The most modest of procedural safeguards would have made the process substantially more rational without impairing any legitimate governmental interest.").

When juries are given license to ignore disproportions between punishments and wrongs and are told they may impose large punishments based on large corporate wealth, and when no principled guideline has been articulated as to how much of a corporation's wealth may or may not be taken to "send a message," there is no reasonable constraint, and due process cannot be satisfied. *See Gore*, 517 U.S. at 588 (Breyer, J., concurring) ("Legal standards . . . must offer some kind of constraint upon a jury or court's discretion, and

thus protection against purely arbitrary behavior."). In *Gore* the Court, applying its three guideposts, held that the disparity between the compensatory damages of $4,000 and the punitive damages of $2 million was unconstitutionally excessive. 517 U.S. at 565, 585-86. But the Court did not explain why BMW's great wealth could not make the disparity constitutionally acceptable. If corporate wealth can properly be considered on the theory that it takes more to deter a wealthy corporation than to deter a less wealthy one, it is difficult to discern why, considering BMW's conduct in Alabama that the Alabama Supreme Court held wrongful under Alabama law, the wealth-is-relevant-to-send-a-message theory would not allow an Alabama jury to conclude that BMW would not alter its conduct in Alabama unless the punitive damages were large enough to "get the attention" of BMW's top management.

In *Haslip* the Alabama system of awarding punitive damages survived a due process attack in part because in Alabama "the factfinder must be guided by more than the defendant's net worth." 499 U.S. at 22. The Court could make that statement because Alabama prohibited the jury from hearing any evidence of a defendant's wealth. Had that not been so, a reviewing court could not ascertain whether the amount of punishment imposed by a jury was "guided by more than the defendant's net worth." *Id.*

Further, because juries' freedom to discriminate on the basis of corporations' wealth is so unchecked and unpredictable, the due process requirement of adequate notice is contravened. *See Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). If the size of punitive damages awards may be based on a corporate defendant's wealth, there is no notice of the severity of the

penalty a State may impose for any conduct. If the jury decides to base the amount of punishment on the company's wealth at the time of trial, it is indisputable that the company could not, when it committed the wrongful act years earlier, have had notice what its wealth would be several years hence. If, on the other hand, the jury decides to base the amount of punishment on the company's wealth at the time it committed the wrongful act and the company is now much poorer, the punishment could bankrupt the company.[13]

As these dangers have become more severe in recent years, the need to ensure that juries are not given license to punish simply for being wealthy or for being a corporation has increased.

> Punitive damages are . . . ripe for reevaluation. In the past, such awards "merited scant attention" because they were "rarely assessed and likely to be small in amount." . . . Even then, they came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap. Recent years, however, have witnessed an explosion in the frequency and size of punitive damages awards.

Haslip, 499 U.S. at 61 (O'Connor, J., dissenting).

In short, there is now a compelling need for the Court to declare that, regardless of whether many courts have

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[13] Similarly, consider a successor-liability case brought against Company A in 2002, ten years after it acquired Company B, for a tortious act committed by Company B in 1985—a situation not unlike many asbestos cases. Suppose that Company B had a net worth of $10 million in 1985 and $20 million in 1992, and that Company A had a net worth of $50 million in 1985 and has a net worth of $5 billion in 2002. Company A could not have had notice in 1985 that it might have to pay a punitive damages award based on a net worth of $5 billion. On the other hand, using any of the earlier net-worth numbers conflicts with the (irrational) theory that the punitive award against a very large company has to be very large to "get its attention."

modernly found the practice acceptable, evidence of a publicly held corporation's net worth, assets, or income cannot constitutionally be admitted into evidence when the only purpose for which it is offered is to enable the jury to increase a punitive damages award either on the theory that wealthier corporations deserve greater punishment or on the theory that wealthier corporations will not be deterred from wrongful conduct unless larger punitive damages than would be imposed on poorer defendants are imposed to "send a message." In *Gore* the Court held that evidence of conduct in other parts of the country could not be the basis for increasing punitive damages if the conduct was not wrongful in those parts of the country, even if wrongful in the forum jurisdiction. 517 U.S. 559. Just as the Court drew a careful distinction about the permissible and impermissible use of evidence regarding conduct in other parts of the country, it should now draw a careful distinction between the permissible and impermissible use of evidence of wealth.

CONCLUSION

The judgment of the Supreme Court of Utah should be reversed.

Respectfully submitted,

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